IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
JACK KENNETH MIRTH,	)	**Case No. 98-20165**
and	)	
RUTH GEORGE ANN MIRTH,	)	
	)	
	)	
Debtors.	)	
	)	
	)	
_____	)	
	)	
LAKESHORE TIE & LUMBER, INC., an	)	**Adversary No. 98-6307**
Idaho Corporation, and LEWIS R.	)	
KULCZYK and VICKI DONALDSON,	)	
	)	**MEMORANDUM OF DECISION**
Plaintiffs,	)	**and ORDER**
	)	
vs.	)	
	)	
JACK KENNETH MIRTH and	)	
RUTH GEORGE ANN MIRTH,	)	
	)	
Defendants.	)	
	)	
_____	)	

HONORABLE TERRY L. MYERS, U.S. BANKRUPTCY JUDGE

Michael E. Ramsden, RAMSDEN & LYONS, Coeur d'Alene, Idaho, for Plaintiffs.

Jack Kenneth Mirth and Ruth George Ann Mirth, Cocolalla, Idaho, Pro Se Defendants.

This matter is before the Court upon the motion of Lakeshore Tie & Lumber, Inc., Lewis R. Kulczyk and Vicki Donaldson (hereafter collectively "Lakeshore" or "Plaintiffs") for entry of default judgment. This motion was presented on March 30, 1999, at a hearing where Defendant Jack Mirth appeared and during which the Defendants were provided a period of thirty days to file submissions in opposition. This grant was made in conjunction with a similar period of time provided the Mirths to respond to summary judgment in other pending adversary proceedings.[1] As in those other proceedings, the Mirths have here failed to file anything despite being provided the opportunity to do so.

BACKGROUND

On November 12, 1998 Lakeshore filed a complaint alleging that obligations owed by the Mirths were or should be held to be nondischargeable pursuant to §§ 523(a)(2)(A), 523(a)(4) and 523(a)(6).

[1] This adversary proceeding concerns a Rule 55(b) default judgment, and is thus dissimilar to *Bluegreen v. Mirth*, Adversary No. 98-6196 and *Kiss v. Mirth*, Adversary No. 98-6241, both of which were before the Court on March 30 but on motions for summary judgment.

The complaint generally alleges false pretenses, false representations and actual or constructive fraud under § 523(a)(2). Standing alone, the adversary complaint does not plead fraud with sufficient particularity. *See* Fed.R.Civ.P. 9(b), incorporated by Fed.R.Bankr.P. 7009. The complaint also asserts fraud or defalcation by Mirths while acting in a fiduciary capacity under § 523(a)(4).[2] Here, too, the fraud is not pleaded with specificity. In similar terms, the complaint alleges that the Mirths willfully and maliciously injured Lakeshore and that the consequent injury should be held nondischargeable under § 523(a)(6).

The complaint alleges at III(6), p.2, that the aggregate amount of Lakeshore's "equal or exceed" $1,619,721.27. The prayer for relief asks that the Court "[o]rder that the Debtors' indebtedness to Lakeshore (or such amount thereof that the Court deems appropriate) constitutes a nondischargeable debt pursuant to 11 U.S.C.
§ 523." Complaint at VII(1), p.5. The complaint also seeks pre-judgment and post-judgment interest, attorney's fees, costs and expenses and an order establishing that those obligations are likewise nondischargeable. Complaint at VII(2), p.5.

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[2] No claim was made, however, under the larceny or embezzlement provisions of § 523(a)(4).

Despite the brevity of the adversary complaint, additional factual allegations are made through Lakeshore's incorporation of its "Second Amended Complaint for Injunctive Relief and Damages and Demand for Jury Trial" (the "State Court Complaint") filed in 1996 in the District Court of the First Judicial District of the State of Idaho, Bonner County, against Mirth and related entities.[3] Lakeshore asserts that the relief sought in this Court related to nondischargeability is supported by certain specified counts and paragraphs of the State Court Complaint.[4]

In December 1998, the Clerk entered default, Fed.R.Civ.P. 55(a), Fed.R.Bankr.P. 7055, based upon Mirth's failure to appear and answer. This default was served on the Mirths by the Clerk. Soon thereafter, the Mirths entered a notice of appearance, pro se. Docket No. 8, filed January 8, 1999.[5]

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[3] Though incorporated by reference, the State Court Complaint was not attached to the original adversary complaint. In January, 1999 Lakeshore moved for leave to attach the Complaint and that request was granted by order entered February 3, 1999.

[4] *See* Complaint at III(6) (incorporating the entirety of the State Court Complaint); at IV(7) (incorporating allegations specifically for purposes of § 523(a)(2)(A) relief); at V(10) (incorporating for purposes of § 523(a)(4) claims); and at VI(13) (incorporating for purposes of § 523(a)(6) claims).

[5] This was not a response directly traceable to Lakeshore's defaulting them; the Mirths had filed a "general" notice of appearance alleging an intent to appear and defend all outstanding adversaries and pending motions, and the Court directed the Clerk to file a copy of this pleading in all pending files.

The Mirths have not, however, ever moved to set aside the Clerk's entry of default. *See* Fed.R.Civ.P. 55(c), Fed.R.Bankr.P. 7055.

In February 1999, Lakeshore moved for default judgment and scheduled a hearing upon that motion. The record does not reflect that either the motion or the notice of hearing was served on the Defendants, even though they might have been deemed to have "appeared" given the notice, Docket No. 8, discussed above. *See* Fed.R.Civ.P. 55(b)(2) (requiring 3 days' notice of hearing on motion for entry of default judgment if the opposing party has appeared in the action.)[6]

Hearing was held on several matters involving the Mirths during the Court's morning calendar on March 30. Lakeshore had scheduled its default motion for hearing in the afternoon that same day. While Mr. Mirth was present in the morning, the Court noted for the record that additional matters were scheduled to be heard that afternoon. Mr. Mirth indicated, however, that due to a medical appointment he could not be present at that time. The Court therefore, consistent with rulings allowing the Mirths 30 days to respond to outstanding motions in other matters, alerted Mr. Mirth to the Lakeshore adversary and its pending motions, and granted a similar 30 day period within

[6] Plaintiffs aren't criticized for the lack of service under Rule 55(b)(2) since it doesn't appear that the notice of appearance, Docket No. 8, had been sent to Plaintiffs at the time it was filed by the Clerk, and Plaintiffs had no reason to believe the Defendants had "appeared" or were entitled to a 3-day notice.

which to submit opposition. This was done in the absence of Plaintiffs' counsel, who was advised of the situation that afternoon when the matter was called.[7]

As in all the other matters, no post-March 30 submissions have been filed by the Mirths in this adversary proceeding.

DISCUSSION

The Court has reviewed the State Court complaint in detail. From that review, it appears that any deficiencies in specific pleading of fraud under Fed.R.Civ.P. 9(b) have been remedied. The allegations are specific enough to require response without the need for Lakeshore to provide a more definite statement or more specific allegations.

The Court further finds that the matter is properly presented for consideration of entry of default judgment. The Mirths, following withdrawal of their counsel, filed notice indicating an intention to defend every pending adversary proceeding brought against them. The complaints of numerous creditors against the Mirths assert nondischargeable liabilities of several million dollars in the aggregate. Mr. Mirth, who was physically present at the hearings on the morning of March 30, was reminded of this situation and provided an

[7] The Court finds that the actual appearance of Mr. Mirth, and what transpired at hearing, is sufficient notice of the intent of Lakeshore to seek default judgment, and adequately replaces the notice otherwise required under Rule 55(b)(2).

additional period of time to respond yet he and his wife have failed to do so in any of the pending matters.[8]

The prior default of the Mirths in this case has not been set aside. The Mirths have not followed their notice of appearance with the filing of an answer putting any of the material allegations at issue. The Mirths were specifically provided notice of the outstanding motion for entry of default judgment at the hearing on March 30. The Court therefore concludes that it may properly consider Lakeshore's request for default judgment.

Simply because the opposing party has failed to respond does not mean that default judgment is "automatic". As this Court discussed in *Roberts v. National Mortgage Services (In re Roberts)*, 98.4 I.B.C.R. 106 (Bankr. D.Idaho 1998), the Court has an independent duty to determine that the relief sought is appropriately granted upon the allegations made. For that reason, the Court has independently reviewed the record notwithstanding the Mirths' default.

A. Section 523(a)(6) cause of action

As this Court recognized in *Aldrich v. Belmore (In re Belmore)*, 226 B.R. 433, 98.4 I.B.C.R. 102 (Bankr. D.Idaho 1998), the U.S. Supreme Court in

[8] The Court notes, from a review of its files and records, that despite Mr. Mirth's representations on March 30 regarding appearing for examination at a meeting of creditors, §§ 341, 343, he failed to appear. His Trustee has now filed an action under § 727 to deny the Debtors' discharge based upon this failure to appear and for other reasons. Entry of relief therein might moot debt-specific § 523 relief.

Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974 (1998), requires an "intent to injure" for purposes of nondischargeability under the wilful and malicious injury provisions of § 523(a)(6). The Court's review of the adversary complaint and state court complaint failed to disclose specific allegations concerning this element and the Court concludes that default judgment is inappropriate on this ground.[9]

B. Fraud under § 523(a)(2) and fraud or defalcation by a fiduciary under § 523(a)(4).

The Court's review of the State Court complaint identifies two situations where fraud allegations are adequately set forth. These relate to alleged sales of real property.[10] The balance of the state court allegations do not have similar specificity concerning misrepresentation, reliance and injury. *See generally, In re Tallant*, 218 B.R. 58, 64 (9th Cir. BAP 1998).

To the extent not clearly pleaded under § 523(a)(2), is the complaint nevertheless sufficient for default purposes under § 523(a)(4) in regard to fiduciary defalcation or fraud? Even if the defalcation or fraudulent conduct is

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[9] While the two complaints clearly contain allegations that the Mirths intended to take Lakeshore's money and property, which would have a consequent injury upon Lakeshore, *Geiger* changed the prior Ninth Circuit standard which allowed for nondischargeability under § 523(a)(6) based upon an intentional act which had the consequence of causing injury. 226 B.R. at 435, 98.4 I.B.C.R. at 103.

[10] State Court Complaint, at II(51) to (53).

adequately alleged, the existence of an express fiduciary relationship is also prerequisite to the fiduciary portions of § 523(a)(4). *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 19985 (9th Cir. 1996); *Wussler v. Silva (In re Silva)*, 99.2 I.B.C.R. 77, 80 (Bankr. D.Idaho 1999). While the State Court Complaint can be read in part as asserting a claim for the imposition of a constructive or resulting trust as a remedy for the Defendants' conduct, this is not sufficient for § 523(a)(4) purposes. *The Mackenzie Feedlot v. Bruins (In re Bruins)*, 97.3 I.B.C.R. 69 (Bankr. D.Idaho 1997).

It is possible, however, for the State Court Complaint to be read as indicating that in regard to most if not all of the underlying transactions, Lakeshore and Mirths were acting in what could be characterized as a joint venture. Such a relationship imposes fiduciary duties. *See, e.g.*, Idaho Code 53-321. What is not clear is whether Lakeshore intends or accepts this reading.[11]

The Court therefore concludes that in those aspects where the State Court Complaint does not allege the traditional elements of fraud, *i.e.* other than in regard to the two sales, the fiduciary prerequisite for a claim for relief

[11] The State Court Complaint does not expressly assert partnership or joint venture. Plaintiff does characterize causes of action for "breach of fiduciary duty of licensed real estate broker" (though Count V seems to allege negligence); "breach of fiduciary duties of investment fiduciary" (apparently Count III); "breach of fiduciary duty to account" (though Count VIII appears to allege just a failure to account, and not a fiduciary obligation); and "breach of fiduciary duties of a trustee" (apparently Count IX's resulting trust allegations). All would require greater explanation under the applicable bankruptcy authorities.

under § 523(a)(4) must be further established. Lakeshore must show that the Mirths occupied a fiduciary relationship under applicable nonbankruptcy law, either by clarifying the allegations which relate to joint venture or by identifying other bases for the Court to conclude fiduciary duties were implicated. Once that is done, the Court can address the claim of nondischargeability for defalcation or fraud by a fiduciary.

C. Entry of a default judgment

While the Court can determine that entry of a default judgment would be appropriate under the record and under § 523(a)(2) to a limited degree, and potentially under §523(a)(4), the record is incomplete to allow entry of that judgment at the moment. Rule 55(b)(2) provides in part:

> "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. . .".

The Court is unable upon the extant record to establish the amount of the nondischargeable § 523(a)(2) obligation. The Court is also unable to make a finding as to fiduciary relationship(s), as discussed above, and is also unable to ascertain an exact amount of the claims under that cause of action. The

Court therefore determines that additional submissions are required. Rule 55(b)(2).[12]

Lakeshore will be provided a period of forty (40) days from the date of the entry of this Decision and Order within which to file an affidavit of amount due under its claims of nondischargeability under § 523(a)(2), and its submissions in regard to any nondischargeable § 523(a)(4) debt.[13] As to the amounts of claims, the affidavits shall be specific as to the amounts claimed under its causes of action, and also include itemization of any prejudgment interest claimed to be due and the basis claimed for such an award.

Upon review of such submissions, the Court will determine whether or not the record is sufficient to allow entry of default judgment or whether additional submissions and/or an evidentiary hearing shall be required.

ORDER

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[12] The Court recognizes that the March 30 afternoon hearing scheduled by Lakeshore was, in fact, intended as a "prove up" hearing under the Rule, and Plaintiffs' counsel appeared with witnesses for that purpose, only to be informed by the Court that the Mirths had been granted 30 days to contest the default. The issue of proving up the default judgment had to be delayed until it was determined what the Mirths would assert and whether the process under Rule 55 would continue at all.

[13] Since the Mirths did generate and lodge the "notice of appearance" discussed above -- and appeared on March 30 -- the Court concludes that these additional affidavits shall be served by Plaintiffs on the Mirths.

Based upon the foregoing, Lakeshore shall within forty (40) days of the date hereof submit additional affidavits and materials in support of its motion for default judgment. The Court shall upon review of the same either enter judgment as may be appropriate or advise if further submissions and/or hearing is necessary.

Dated this 20th day of August, 1999.